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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

AURA SYSTEMS, INC., CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS and ZVI KURTZMAN,

Petitioners,

vs.

MICHAEL J. FRANKSTON,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the Ninth Circuit Court of Appeals reverse a federal district court's correct anticipation of the decision of a state court of last resort?

2. May the Ninth Circuit Court of Appeals decide that it is immaterial whether plaintiff's original choice of venue was improper when it reviews a transferee court's application of choice of law rules?

3. Is it constitutionally permissible to permit a plaintiff's forum shopping under *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274 (1990), to result in the application of the transferor's longer statute of limitations to plaintiff's breach of oral contracts claims when the transferor forum had absolutely no contact with the litigation?

LIST OF PARTIES

Petitioners Aura Systems, Inc. ("Aura Systems"),[1] Zvi (Harry) Kurtzman ("Kurtzman"),[2] Innovative Information Systems ("IIS")[3] and Cypher Master, Inc. ("CMI")[4] (collectively, "Aura") were the defendants and respondents below.

Respondent Michael J. Frankston ("Frankston") was the plaintiff and appellant below.

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1. Aura Systems is a Delaware corporation, which develops and manufactures electronic equipment for defense and commercial applications. Aura Systems headquarters and principal place of business is El Segundo, California.

2. Kurtzman, an individual, is a resident of California and is the president and principle executive officer of Aura.

3. IIS is a California corporation, which was an affiliate of defendant Cypher Master, Inc., and now operates as a subsidiary of Aura Systems.

4. CMI is a Texas corporation, which was purchased by Aura systems in 1988 and is operated by Aura Systems as a corporate division.

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OPINIONS BELOW

The order and judgment re cross-motions for summary judgment by Hon. Lourdes G. Baird, district court judge for the Central District of California, is reprinted in Appendix C at 7a and 17a, respectively.

The memorandum decision of the Ninth Circuit Court of Appeals reversing the order and judgment of the district court is reprinted in Appendix B at 2a.[5]

The order of the Ninth Circuit Court of Appeals denying the petition for rehearing is reprinted in Appendix A at 1a.

STATEMENT OF JURISDICTION

At issue before the district court on summary judgment was application of choice of law rules under *Ferens*. Specifically, she decided whether California or Massachusetts law applied in connection with the applicable statutes of limitations governing claims for breach of oral contract. The trial court had diversity of citizenship jurisdiction pursuant to 28 U.S.C. § 1332.

On September 15, 1993, the trial court, The Honorable Lourdes G. Baird presiding, entered judgment in favor of petitioners, Aura. On April 17, 1995, the Ninth Circuit Court of Appeals reversed the trial court's grant of summary judgment. On May 25, 1995, the Ninth Circuit Court of Appeals denied Aura's Petition for Rehearing.

The jurisdiction of this Court to review the order of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

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5. The Memorandum Opinion is also available via LEXIS at 1995 U.S. App. LEXIS 9006.

STATUTES INVOLVED

The statutes involved, 28 U.S.C., §§ 1391 and 1404, California Code of Civil Procedure, § 339 and Massachusetts General Laws, chapter 260, §§ 2 and 9 are set forth in Appendix D at 21a-22a.

STATEMENT OF THE CASE

A. Statement of Facts

The lawsuit regards claims under various alleged oral agreements and loans of money between Frankston and Kurtzman. The other defendants are business entities that Kurtzman developed or led and in which he invited Frankston to join as a shareholder, officer and director.[6] All relevant, material acts occurred in California. All of the defendants reside within the judicial district of the Central District of California. At all relevant times, Frankston was at least a half-time resident of California.

In November 1988, Frankston and Kurtzman quarreled. In March 1991, Frankston filed this lawsuit in the federal court sitting in Massachusetts. Defendants sought dismissal of the action, or in the alternative, transfer to the proper venue, the Central District of California. The Massachusetts court transferred the action to California without passing on the question of whether Massachusetts was an appropriate venue or whether the court had personal jurisdiction over any of the defendants. The defendants filed counterclaims and affirmative defenses.

On the eve of trial, the parties made cross-motions for

6. Also in dispute is whether Frankston was an employee or financial advisor for any of the defendant companies.

summary judgment. The crux of both sides' motions was whether their opponents' claims were barred by the applicable statutes of limitations. Frankston argued that Aura's cross-claim for breach of oral contract was barred by California's two year statute of limitations. Frankston also argued that his claims for breach of oral contracts were preserved by Massachusetts' six year statute of limitations.

B. Proceedings Below

The trial judge accepted Frankston's position that California's statute applied to the counterclaims as an admission that the appropriate choice of law was California for all claims in dispute. In addition, she found that the district judge sitting in Massachusetts would have applied the Restatement (Second) of Conflicts of Laws rule that the applicable statute of limitations is that of the state with the most significant relationship to the dispute. The state with the most significant relationship to the dispute was California. Under California law, all of Frankston's claims were time barred. Judgment was entered in favor of Aura and against Frankston as to all causes of action in the complaint.

The Ninth Circuit reversed. It ignored the issue of whether venue was proper in Massachusetts, and declined to address the issue of personal jurisdiction. The Ninth Circuit noted that Judge Baird's analysis correctly anticipated the Supreme Judicial Court of Massachusetts: the highest Massachusetts court did adopt the significant relationships approach advocated by the Restatement (Second). The Ninth Circuit then proceeded to reject Judge Baird's analysis of Massachusetts' choice of law rules. It rejected her *Erie* obligation to determine how the highest state court would rule.

Aura petitioned for rehearing on the grounds that the Ninth Circuit had failed to apply properly the law under *Erie Railroad v.*

Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938) and that it mistakenly concluded that the transfer issues had not been preserved. The Ninth Circuit also ignored the constitutional issues implicated by the application of Massachusetts' longer statute of limitations when Massachusetts had absolutely no contact with the litigation. The Ninth Circuit denied the petition.

REASONS FOR GRANTING THE WRIT

Ferens has been applied more broadly than its holding or constitutional considerations suggest it should. Where *Ferens* held only that a plaintiff initiated transfer should not be treated differently than a defendant initiated transfer, the Ninth Circuit in this case has interpreted *Ferens* to mean that the transferee court's law should be adopted by the transferor without examination of whether venue was proper in the transferee forum in the first instance and without examination of any constitutional or equitable considerations.[7] This petition puts before this Court an opportunity to instruct the lower courts in the constitutionally permissible and proper application of *Ferens* and *Erie* to choice of law rules, particularly to determine proper statutes of limitations.

A. Under The *Erie* Doctrine, The District Court Properly Reached Resolution Of The State Court Issue As The Massachusetts Supreme Court Reached It.

The twin aims of the *Erie* Doctrine are: (1) to discourage forum shopping; and, (2) prevent the inequitable administration of the law. *Begay v. Kerr McGee Corp.*, 682 F.2d 1311, 1317 (9th

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7. At least one commentator has suggested that *Ferens* should be revisited to address the problems created by plaintiff's forum shopping for statutes of limitations purposes. *See, e.g.*, Norwood, *Double Forum Shopping and the Extension of Ferens to Federal Claims that Borrow State Limitation Periods*, 44 Emory L.J. 501 (1995).

Cir. 1982) citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). As the Ninth Circuit decided it here, it did not matter that Frankston's original choice of venue was not proper — Frankston may reap the benefit of forum shopping. The N ıth Circuit invites the outcome that Frankston's oral contract claims will be measured by a six year statute of limitations and petitioners' oral contract claims will be measured by a two year statute.[8]

This unjust result is the direct consequence of the Ninth Circuit's failure to apply properly the *Erie* Doctrine. Although the Ninth Circuit mentioned *Ferens* in support of its conclusions, it construes *Ferens* too broadly. The Ninth Circuit did not address the equitable issues raised by the trial court or petitioners regarding differing statutes of limitations nor did it acknowledge that *Ferens* was silent on the issue.[9] The Ninth Circuit also ignored *Erie*. Under *Erie*, where the law is unclear, the federal court in diversity cases "must attempt to determine how the highest state court would rule." *See Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1424 (9th Cir. 1986). This is precisely what Judge Baird did.

The Ninth Circuit acknowledged that since 1913 the Massachusetts Supreme Court had not addressed the issue of choice of law for statutes of limitation. Appendix B at 4a-5a. In the meantime, however, the Second Restatement of Conflicts had been revised such that there was a question of the continuing vitality of Massachusetts' pre-World War I precedent. Further,

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8. Assuming *arguendo* that the Massachusetts' venue was proper in the first instance, the transfer did not create this anomaly. Massachusetts' peculiar borrowing statute, Mass. Gen. L. ch. 260 § 9, predicts it. It is for this reason that the determination of venue is a pivotal issue.

9. This Court's opinion in *Ferens* did not discuss the constitutionality of the transferor's application of its longer statute of limitations when the transferor forum had absolutely no contact with the litigation.

the district court had correctly noted that Massachusetts applies the Second Restatement of Conflicts to contract actions. *Id.*

By September 15, 1993, the Massachusetts Supreme Court had not been faced with such a conflict of laws fact pattern in any reported opinion. The Ninth Circuit resisted its obligation under *Erie* to accept the trial court's determination that the state's highest court offered no real guidance on the questions before it. *See Cunha v. Ward Foods, Inc., supra; also, Fedrick, Inc. v. Borg-Warner,* 552 F.2d 852, 856 (9th Cir. 1977). One must add to this equation the obvious injustice created by the application of differing statutes of limitation to the same parties on related claims under the same theories of action where there is no dispute that the same substantive law applied to both parties' claims.

Most importantly, Judge Baird was absolutely accurate in her assessment that, under the circumstances, the Massachusetts Supreme Court would apply the Second Restatement. In *New England Telephone & Telegraph Company v. Gourdeau Construction,* 419 Mass. 658, 647 N.E.2d 42 (1995) ("*New England Telephone*") the Massachusetts Supreme Court applied the Second Restatement and found sufficient nexus with the State of Massachusetts to apply its statute of limitations.[10] Thus, where the law was unclear as to what the highest Massachusetts court would do, this district court thought it out and properly performed her task under *Erie.*

The Ninth Circuit stated that a "change of law to apply so as

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10. At the Ninth Circuit hearing, there was discussion as to whether the court in *New England Telephone* applied the "most significant relationship test." Any fair reading of the case reveals that it did apply the approach advocated by the Second Restatement to the facts before it. *See New England Telephone* at 663-664. The Ninth Circuit so noting, was disingenuous to say that *New England Telephone* only "adopted [the modern approach] prospectively." Appendix B at 5a.

to eliminate existing causes of action" would be for the "Commonwealth [to] countenance ... an unjust result." Appendix B at 5a. However, for exactly the same "procedural versus substantive" dichotomy, the Commonwealth does exactly that, going so far as to eliminate criminal defenses. *See Commonwealth v. Bargeron,* 402 Mass. 589, 590-591, 524 N.E.2d 829 (1988).

The Ninth Circuit's statement presupposed that the matter of existing Massachusetts' law was without *bona fide* doubt. That was not so. Further, that Frankston faced a harsh result is not to say it was an unjust or incorrect result.

As it is, the Ninth Circuit requires the trial court to determine whether state law "lacks definitive adjudication" without offering any guidance to the trial court on remand. Upon what basis should she determine whether there is "definitive adjudication" when (1) the issue had not been addressed in 80 plus years, (2) the fact that Massachusetts follows the Restatement which, in 1988, rejected the old "procedural versus substantive" dichotomy, and (3) the inequitable application of two differing statutes? *See Fedrick, Inc. v. Borg-Warner, supra* at 856.

Judge Baird had before her the following: All defendants reside in California. The applicable contract law is California law. Venue is proper in the Central District of California. Venue was not proper in the District of Massachusetts. *Compare* 28 U.S.C. § 1391(a)(1) and (2). The choice of law question before Judge Baird had not been considered by the highest Massachusetts court in over 80 years, but there were clear, unambiguous indicators of what that court would decide.

The Ninth Circuit Memorandum, literally read, instructs the trial court to simply determine that 1913 precedent dealt with the

issue and stopped there. This one dimensional approach rejects the kind of critical analysis of which the district courts are capable. In this case, it renders "wrong" an analysis by a district court which accurately predicted "how the highest court would rule." On the other hand, the Ninth Circuit took it upon itself, without any reasonable basis, to assume that the Massachusetts Supreme Court would not have taken the occasion of this fact pattern to conform with the Second Restatement amendment.

The Ninth Circuit did not juxtapose the "unjust result" to Frankston with the obvious injustice to Aura of applying two different statutes of limitations in this case. It is the unique factual and procedural posture of this case which make it the proper case to reconsider *Ferens* and the question of the plaintiff's choice of forum and its affects on choice of law in connection with statutes of limitations.

B. The Ninth Circuit Failed To Consider Whether *Ferens* Requires A Determination That Venue Was Proper In The Transferor Forum As The Necessary First Step In Application Of Choice Of Law Rules.

In the summary judgment motion practice below, petitioners raised the issue of reexamining the Massachusetts district court's transfer order. In 1991, the first responsive pleading filed by them was a motion to dismiss for lack of proper venue in the District of Massachusetts. In the alternative, appellants moved to transfer venue pursuant to 28 U.S.C. § 1404(a). Judge Caffrey denied the motion which challenged the propriety of venue making no findings of fact or conclusions of law with respect to this critical issue. The motion to transfer to California, however, was granted.

The Ninth Circuit stated, "Aura failed to properly preserve this issue below and thus waived it." Appendix B at 4a, fn. 2. That

is not correct. As summary judgment was pending before Judge Baird, the Ninth Circuit decided *Muldoon v. Tropitone*, 1 F.3d 964 (9th Cir. 1993). Aura brought *Muldoon* to the attention of the trial court. There the court held: "Although the district court in Illinois purported to transfer the case under § 1404(a) for the convenience of the parties, its characterization of the transfer is not controlling." *Id.* at 966. In this case, none of the defendant/appellants resided in the District of Massachusetts and the cause of action arose in Los Angeles. While *Muldoon*'s holding strictly related to personal jurisdiction, its rationale is equally applicable to the venue issue. As a result, it was urged upon Judge Baird to examine whether venue was proper in Massachusetts.[11]

Presently, it cannot even be argued that venue in Massachusetts is proper under 28 U.S.C. § 1391(a). In 1991, however, § 1391(a)(3) did not contain the language "if there is no district in which the action may otherwise be brought." The change simply made clear, as must always have been intended, that subsection (a)(3) was a fall back provision and that it could only have been used if there was no district in which venue could be laid pursuant to subsections (a)(1) and (a)(2). *See* 25 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3802.1 at 5 (1994 Suppl.). *See also, U.S. Fidelity and Guaranty Co. v. Mayberry*, 789 F. Supp. 901, 903-905 (E.D. Tenn. 1992).

This Court should instruct the lower courts and parties whether the transferor court's determination (or lack thereof) that venue was proper with the transferor can and should be challenged by the transferee court.

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11. The issue was made moot be Judge Baird's determination that California's two year, oral contract statute of limitations applied.

CONCLUSION

For the above stated reasons and authorities, petitioners respectfully request this Court grant their Writ and consider the constitutional limits of important choice of law rules raised by *Ferens* and *Erie* with respect to statutes of limitations and plaintiffs' forum shopping.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 25, 1995

Frankston v. Aura Systems, Inc., et al.

United States Court of Appeals for the Ninth Circuit

Case Nos. 93-56601, 93-56534

ORDER

BEFORE: MCKAY,* REINHARDT, and FERNANDEZ, Circuit Judges.

Appellees' Petition for Rehearing is denied.

FILED: May 25, 1995

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* The Honorable Monroe G. McKay, Senior Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 17, 1995

Frankston v. Aura Systems, Inc., et al.

United States Court of Appeals for the Ninth Circuit

Nos. 93-56601, 93-56534

MEMORANDUM DECISION*

BEFORE: MCKAY,** REINHARDT, and FERNANDEZ, Circuit Judges.

BACKGROUND

Frankston was one of the founders of Aura Systems, and at one time served on its Board of Directors.[1] He also had an oral contract with the company to provide various consulting services from his Massachusetts home. The relationship soured, and Frankston brought an action against the company to recover money allegedly due him from various loan agreements, for reimbursement of costs and expenses, and for past due payments

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Monroe G. McKay, Senior Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

1. "Aura Systems" includes the corporate subsidiaries and affiliates of Innovative Information Systems and Cypher Master, Inc. as well as co-founder Zvi Kurtzman.

for services rendered. Aura Systems also filed counterclaims, but those claims are not at issue in this appeal.

Frankston, a Massachusetts resident, originally filed this action in the district court for the District of Massachusetts. Pursuant to Aura Systems' motion, the case was transferred to the Central District of California. Subsequently, Aura Systems moved for summary judgment on the ground that Frankston's complaint was barred by California's two-year statute of limitations which applies to all oral agreements. Frankston opposed the motionprimarily on the ground that Massachusetts' six-year statute of limitations applied. The district court ruled in favor of Aura Systems reasoning that under Massachusetts' choice of law rules, California's statute of limitations applied. This appeal followed. We reverse.

ANALYSIS

A grant of summary judgment is reviewed de novo. *Jesinger v. Nevada Federal Credit Union,* 24 F.3d 1127, 1130 (9th Cir. 1994). A district court's decision concerning the appropriate choice of law is reviewed de novo. *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss,* 991 F.2d 1501, 1505 (9th Cir. 1993). The same de novo standard applies to the interpretation of state law. *State Farm Mut. Auto. Ins. Co. v. Davis,* 937 F.2d 1415, 1418 (9th Cir. 1991).

When a diversity action is transferred pursuant to §1404(a), the court to which the action is transferred must apply the same state law, including choice of law rules, that the transferor court would have applied had the action remained there. *See Ferens v. John Deere,* 110 S.Ct. 1274 (1990); *Muldoon v. Tropitone,* 1 F.3d 964, 966 (9th Cir. 1993). This means that the district court here

was required to apply the same law as if the action had remained in the District of Massachusetts. Accordingly, Massachusetts' choice of law rules apply to this case.[2]

The parties dispute what Massachusetts' choice of law rules require. The district court reasoned that Massachusetts applies the Second Restatement of Conflicts to contract actions, and accordingly follows the "most significant relationship" test. The court proceeded to identify all of the relevant contacts and determined that California has the most significant relationship to the subject matter of the claim. Thus, it concluded, Massachusetts would apply California law to this action.

The plaintiffs do not dispute that California substantive law applies to their claims. Rather, they assert that the district court overlooked the fact that while Massachusetts' courts apply the substantive law of the state with the most significant relationship, they apply the procedural law of Massachusetts. They also assert that Massachusetts considers statutes of limitations to be procedural, and thus, that Massachusetts' courts would apply Massachusetts' statute of limitations to this action. *See Hemric v. Reed*, 739 F.2d 1 (1st Cir. 1984); *Alves v. Siegels*, 710 F. Supp. 864 (D. Mass. 1989).

At the time that this suit was filed, the highest court in Massachusetts had not addressed the issue of choice of law for

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2. If a Massachusetts court would lack personal jurisdiction over the defendants, then it would violate due process for a Massachusetts court to apply its law. *See Muldoon*, 1 F.3d at 967. The defendants note this on appeal. Although there may be sufficient facts in the record to demonstrate the existence of personal jurisdiction (e.g. maintaining a "regional" office in Massachusetts; actively soliciting Massachusetts vendors), we need not address this question now. Aura failed to properly preserve this issue below and has thus waived it.

statutes of limitations for more than eighty years, *see, e.g. Clark v. Pierce,* 215 Mass 552 (1913), but in some modern cases, intermediate courts had reaffirmed the traditional Massachusetts rule treating the matter as procedural. *See e.g., Wilcox v. Riverside,* 487 N.E.2d 860, 861 (Mass.App. 1986) (reversed on other grounds). However, shortly before oral argument, the Supreme Judicial Court of Massachusetts announced that it was changing its traditional rule. In *New England Telephone & Telegraph Company v. Gordeau Construction,* 419 Mass. 658 (Ma. 1995), the court stated that "for the future [ ] this court's treatment of the application of statutes of limitations as procedural will no longer be continued." Rather, the court adopted prospectively the approach advocated by the Second Restatement.

Although Massachusetts' new approach is consistent with that taken by the district court here, we must nonetheless reverse. In this case, the district court was required to apply the law in effect at the time the action arose. There is no indication that Massachusetts intended its change of law to apply so as to eliminate existing causes of action; if anything, it is clear that the opposite is the case. Moreover, we cannot conceive that the courts of the Commonwealth would countenance such an unjust result. Under the applicable rule in effect at the time this action arose, a Massachusetts court would have applied its own six-year statute of limitations. That is what the district court was also required to do. Thus, the district court erred in granting summary judgment.[3]

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3. We also note that even if the California statute of limitations applied summary judgment may have been inappropriate. Frankston asserts that the loan obligations were not due until money was available to pay them. There appear to be material issues of disputed fact as to whether Aura had sufficient funds to meet this obligation. If such funds were lacking, the statute of limitation did not begin to run.

Appendix B

Accordingly, the grant of summary judgment is REVERSED.

FILED: April 17, 1995

APPENDIX C—JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED SEPTEMBER 15, 1993

United States District Court
Central District of California

Case No. CV-91-6232 LGB (Ctx)

JUDGMENT

Defendants' motion for summary judgment as to the causes of action in the complaint and Plaintiff's motion for summary judgment as to the causes of action in the counterclaim came on regularly for hearing before this Court on September 13, 1993. After considering the moving and opposing papers, arguments of counsel and all other matters presented to the Court IT IS HEREBY ORDERED that Defendant's motion for summary judgment is GRANTED; Plaintiff's motion for summary judgment is GRANTED as to the third cause of action in the counterclaim only.

This action arises out of an alleged breach of contact between Plaintiff, Michael Frankston and numerous defendants.[1]

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1. 1 Defendant Aura Systems, Inc., ("Aura") is a Delaware corporation, which develops and manufactures electronic equipment for defense and commercial applications;

2 Defendant Cyphermaster, Inc. ("CMI") is a Texas corporation, which was purchased by Aura in 1988 and is operated by Aura as a corporate division;

3 Defendant Innovative Information Systems, ("ISS" [sic]) is a California corporation, which was an affiliate of CMI, and now operates as a subsidiary of Aura; and

(Cont'd)

Appendix C

This suit was originally filed in the United States District Court for the District of Massachusetts, on March 13, 1991 and was transferred to this District on September 18, 1991.

On July 13, 1993, Plaintiff was before this Court on a motion for summary judgment as to the first cause of action in the complaint and a motion for summary judgment as to the causes of action in the counterclaim. This Court denied both of Plaintiff's motions.

The UNCONTROVERTED FACTS in this action are as follows:

Plaintiff was a consultant for Aura Systems, Inc. ("Aura"), Cyphermaster, Inc. ("CMI") and Innovative Information Systems, ("ISS" [sic]) from May 1986 through October 1988. *See* Uncontroverted facts, para. 7. From August 1986 through January 1987 he was the chief financial officer of CMI. *Id.* From February 1987 through January 1989 he served on the board of directors of Aura, and from October 1986 through February 1987, he served on the board of directors of IIS. *Id.*

All of the significant activities that relate to the allegations in the complaint occurred in California. *See* Uncontroverted facts paras, 2-13, 22, 25-27. Plaintiff had his own office in Los Angeles County with Defendants, he maintained a residence and leased a car in California. Moreover, from 1986-1988, Plaintiff spent approximately one half of his time in California and he frequently traveled to California to attend meetings with the Defendants. Frankston depo 249:23-250:1; Uncontroverted facts, 24-27.

(Cont'd)

4 Defendant Kurtzman, an individual, is a resident of California and is the president and principle executive officer of Aura.

Appendix C

Any conclusion of law deemed to be a finding of fact is hereby incorporated into these findings of facts.

Based upon the above the applicable CONCLUSIONS OF LAW are as follows:

This Court has jurisdiction based upon Diversity 28 U.S.C. sec. 1332.

A party, moving for summary judgment, may carry its initial burden by pointing out to the district court that there is an absence of evidence to support an element of the non-moving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). The non-movant, then must set forth specific facts showing that there remains a genuine issue for trial. A "genuine issue" of material fact exists only when the non-moving party makes a sufficient showing to establish all essential elements to that party's case, and on which that party would bear the burden of proof at trial. *Id.; Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 477 U.S. 574, 586-87 (1986).

1. *Defendant's Motion for summary judgment*

The threshold issue that is currently before this Court is whether California or Massachusetts law applies to the allegations in the complaint. If California law applies, the causes of action in the complaint are barred as a matter of law by the two year statute of limitations. Cal. Civ. Proc. sec. 339. If Massachusetts law applies, the causes of action are not barred because Massachusetts has a six year statute of limitations for a breach of an oral contract. Mass. Gen. Law. 260 sec. 2.

As stated *supra,* this action was originally filed in

Appendix C

Massachusetts District Court and it was transferred to this district after the Massachusetts District Court granted Defendants' motion to transfer venue. Following a Defendant initiated transfer, the transferee court must apply the choice of law rules prevailing in the transferor court. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990); *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

Thus, this Court must analyze the laws of the Commonwealth of Massachusetts to determine the appropriate law to apply in this action. The state courts in Massachusetts have adopted the Restatement (second) of Conflict of Laws (1971) with respect to the resolution of conflicts problems involving contracts. *Travenol Labs, Inc. v. Zotal, Ltd.*, 394 Mass. 95 (1985).

The Restatement (second) states:

> The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which . . . has the most significant relationship to the transaction and the parties.

Id.

Further, the Restatement (second) indicates that Courts should consider the following factors when determining which state has the most significant relationship to the transaction:

1. the place of contracting;

2. the place of negotiation of the contract;

3. the place of performance;

4. The location of the subject matter; and

5. the domicil, residence, nationality, place of incorporation and place of business of the parties.

Restatement (second) at section 188.

This Court finds that California has the most significant relationship with the transactions that are the basis for the causes of action in the complaint. All of the significant activities that relate to the allegations in the complaint occurred in California. *See* Uncontroverted facts paras, 2-13, 22, 25-27. Plaintiff had his own office in Los Angeles County with Defendants, he maintained a residence and leased a car in California. Moveover, from 1986-1988, Plaintiff spent approximately one half of his time in California and he frequently traveled to California to attend meetings with the Defendants. Frankston depo 249:23-250:1; Uncontroverted facts, 24-27.

Plaintiff's opposition does not address any of the factors listed *supra*.[2] In fact, Plaintiff essentially concedes that this

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2. Plaintiff engages in an extensive analysis that the Massachusetts statute of limitations applies to the causes of action in the complaint because Plaintiff asserts that a statute of limitations is procedural rather than substantive. Plaintiff argues that even if this Court finds that California law applies to the substantive merits of this action, this Court must still apply the Massachusetts statute of limitations. Plaintiff's argument is not persuasive. As stated by the Supreme Court in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), "the terms substantive and procedural precisely describe very little. . . ." *Id.* 486 U.S. at 727. Moreover, as indicated by the court in *Sun Oil*, "[a] State's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing [its own] statues [sic] of limitation." *Id.*, 486 U.S. at 730.

(Cont'd)

action should be governed by California law because Plaintiff's motion for summary judgment as to the allegations in the counterclaim discussed *infra,* states that California law applies to the allegations in the counterclaim. *See* Plaintiff's motion for summary judgment, 1:25-27.

Based upon the above analysis, this Court finds that the California two year statute of limitations applies to the allegations in the complaint.[3] It is undisputed that Frankston has

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(Cont'd)

Additionally, as discussed *infra,* the parties agree that California law, and California's statute of limitations, govern the allegations in the counterclaim. Thus, based upon this Court's earlier ruling that the allegations in the counterclaim are subject matter related to the allegations in the complaint, California law and California's statute of limitations should be applied to the allegations in the complaint.

Finally, Plaintiff's argument that *Muldoon v. Tropitone Furniture Co.,* 1993 WL 321932 warrants a contrary result is not persuasive because as of September 13, 1993, the date of the hearing on Plaintiff's and Defendants' motions for summary judgment, the *Muldoon* decision had not been released for publication and therefore, was subject to revision or withdrawal.

3. Plaintiff asserts that his third cause of action, for an account stated, is governed by the four-year statute of limitations in Cal. Code Civ. Proc. 337(2). *See* attachment to the complaint, which is a hand written synopsis of the monies Plaintiff alleges he is owed by Defendants.

Plaintiff's argument is not persuasive. *Maggio v. Neal,* 241 Cal. Rptr. 883 (1987) (An account stated is an agreement, based upon the prior transactions of the parties, that the items of an account are true and that the balance is due and owing. A creditor who acts in a self serving manner by creating what is a private record of an "account" and mailing it to the Defendants has not created an account stated.) *Id.,* 241 Cal. Rptr. at 887. Plaintiff has not provided this Court with sufficient admissible

(Cont'd)

not performed any services of any sort for any of the Defendants since January 1989. *See* Statement of Undisputed Facts, para. 30. Thus, all of the allegations in the complaint occurred more than two years prior to Plaintiff's initiating this action on March 13, 1991, in Massachusetts District Court. Accordingly, this Court GRANTS Defendants' motion for summary judgment as to all causes of action in the complaint because the California statute of limitations bars the causes of action in the complaint as a matter of law.

2. *Plaintiff's motion for summary judgment as to the Counterclaim*

The crux of Plaintiff's motion for summary judgment as to the counterclaim is that all of the causes of action are time barred by the applicable statutes of limitations. Plaintiff filed a similar motion for summary judgment that was denied by this Court on July 13, 1993.[4] When this Court ruled on Plaintiff's earlier motion for summary judgment, there was an unresolved issue as to whether California or Massachusetts law applied to the

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(Cont'd)
evidence to establish a genuine issue of material fact that there was an agreement between the parties based upon their prior transactions that the items on his handwritten synopsis are true and that the amounts indicated on this note were due and owing. Thus, Plaintiff has failed to provide this Court with sufficient admissible evidence to establish a *prima facie* cause of action for an account stated. *Maggio*, 241 Cal. Rptr at 887.

4. At that time, this Court indicated that the operative date for determining whether the statute of limitations has run is March 13, 1991, the date that *Plaintiff filed the complaint* because the allegations in the counterclaim are subject matter related to the allegations in the complaint. *Trindade v. Sup. Ct.*, 29 Cal. App. 3d 857, 859-60 (1973); *Sidney v. Sup. Ct.*, 198 Cal. App. 3d 710 (1988).

allegations in the counterclaim. Both sides now agree that California law applies to the allegations in the Counterclaim. *See* Plaintiff's motion 1:25-27; Defendants' opposition, 2:13-17.

a. *Fraud*

Plaintiff asserts that the allegations of fraud in the counterclaim are barred by the statute of limitations because they occurred more than three years prior to the filing of the complaint. *See* Cal. Civ. Proc. sec. 338(d).

Plaintiff's argument is not persuasive because the statute of limitations does not begin to run until the "discovery, by the aggrieved party of the facts constituting the fraud or mistake." Cal. Code Civ. Proc. 338(d). Defendants have provided this Court with admissible evidence that they did not learn of the alleged fraudulent activity until November 1988, when Plaintiff disclosed that he would not perform his promise to reimburse CMI $70,000.00 for the computer purchase. *See,* Kurtzman's June 14, 1993 decl. 8:21-26.[5]

Thus, Defendants' first cause of action for fraud is not time barred by the statute of limitations because the complaint was filed within the three year statute of limitations period.

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5. Specifically, Kurtzman testified that CMI purchased the Symbolics Computer based upon Plaintiff's promise that Plaintiff would finance the purchase. *See* Weems declaration at exhibit F. Further, Kurtzman stated that CMI use[d] its funds to buy the computer because Kurtzman trusted Plaintiff and Kurtzman continued to work with Plaintiff after Plaintiff failed to pay for the computer because Plaintiff was Kurtzman's "very best friend." Kurtzman deposition, 66:21-25 and 86:3-9.

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b. *Breach of Fiduciary Duty*

There is a four year statute of limitations for breach of fiduciary duty. *See* Cal. Civ. Proc. sec. 343; *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1520 (9th Cir. 1985). As with the fraud statute of limitations discussed *supra*, the statute of limitations for breach of fiduciary duty does not begin to run until the aggrieved party learns of the breach. *Stalberg v. Western Title Ins. Co.*, 230 Cal. App. 3d 1223 (1991).

Defendants have provided this Court with admissible evidence to establish that they did not learn of Plaintiff's breach of fiduciary duty until November 1988. Kurtzman's June 14, 1993, decl. para. 17. Thus, the second cause of action in the counterclaim is not barred by the statute of limitations because Plaintiff's complaint was filed well within the four year statutory period.

c. *Breach of Oral Contract*

The third cause of action in the counterclaim, which is based upon an alleged oral contract between Plaintiff and Kurtzman, began in "late 1986" and ended in the summary [sic] of 1988. *See* Kurtzman's decl. para. 21. Thus, this cause of action is barred by the two year statute of limitations for breach of oral contracts in California. Cal. Civ. Proc. sec. 339.

Any conclusion of law deemed to be a finding of fact are hereby incorporated into these findings of facts.

IT IS SO ORDERED.

DATED: September 15, 1993.

Appendix C

/signed/
LOURDES G. BAIRD
United States District Judge

Appendix C

Frankston v. Aura Systems, Inc., et al.

United States District Court
Central District of California

Case No. CV-91-6232 LGB (Ctx)

ORDER

It is hereby ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of Defendants and against Plaintiff as to all causes of action in the complaint.

It is hereby ORDERED ADJUDGED, and DECREED that judgment is entered in favor of Plaintiff and against Defendants as to the third cause of action in the counterclaim.

IT IS SO ORDERED.

DATED: September 15, 1993.

/signed/
LOURDES G. BAIRD
United States District Judge

APPENDIX D — ORDER OF TRANSFER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS FILED OCTOBER 9, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 91-10806-C

MICHAEL FRANKSTON,

Plaintiff,

v.

AURA SYSTEMS, INC., CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS, and ZVI KURTZMAN,

Defendants.

ORDER TO TRANSFER CASE TO THE CENTRAL DISTRICT OF CALIFORNIA

It is hereby ORDERED that the case, *Frankston v. Aura Systems, Inc., Cypher Master, Inc., Innovative Information Systems, and Zvi Kurtzman,* be transferred to the Central District of California forthwith.

s/ Andrew A. Caffrey
Andrew A. Caffrey, J.

Dated:

APPENDIX E — RELEVANT STATUTES

28 U.S.C. § 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

(c) For purposes of venue under this chapter [28 U.S.C.S. § 1391 *et seq.*], a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation

shall be deemed to reside in the district within which it has the most significant contacts.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party. The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought — (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title; (3) in any judicial district in which the agency or instrumentality is licensed to do

business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

Mass. Ann. Laws ch. 260, § 2 (1995)

§ 2. Limitation of Six Years.

Actions of contract, other than those to recover for personal

injuries, founded upon contracts or liabilities, express or implied, except actions limited by section one or actions upon judgments or decrees of courts of record of the United States or of this or of any other state of the United States, shall, except as otherwise provided be commenced only within six years next after the cause of action accrues.

Mass. Ann. Laws ch. 260, § 9 (1993)

§ 9. Suspension in Case of Non-Resident Defendant.

If, when a cause of action hereinbefore mentioned accrues against a person, he resides out of the commonwealth, the action may be commenced within the time herein limited after he comes into the commonwealth; and if, after a cause of action has accrued, the person against whom it has accrued resides out of the commonwealth, the time of such residence shall be excluded in determining the time limited for the commencement of the action; but no action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein.

California Code of Civil Procedure § 339 (1995)

§ 339. Two years; oral contract; certificate, abstract or guaranty of title; title insurance policy; sheriff; coroner; constable; rescission of oral contract

Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in Section 2725 of the Commercial Code or subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or

abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

2. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in * * * an official capacity and in virtue of * * * office, or by the omission of an official duty including the nonpayment of money collected * * * in the enforcement of a judgment.

3. An action based upon the rescission of a contract not in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Supreme Court, U.S.
FILED
SEP 27 1995
CLERK

No. 95-318

In The

Supreme Court of the United States

October Term, 1995

AURA SYSTEMS, INC., *et al.*,

Petitioners,

vs.

MICHAEL J. FRANKSTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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34P

QUESTIONS PRESENTED

1. Whether this Court should review a District Court's denial of petitioners' motion to dismiss for improper venue, when petitioners did not appeal the ruling and have falsely stated to this Court that there was no such ruling?

2. Whether this Court should review the dismissal of petitioners' counterclaim when petitioners did not appeal that dismissal?

3. Whether this Court should review the correct application of the choice-of-law rules in effect in Massachusetts at the time this action was filed, although four years later the highest court of Massachusetts announced that it would apply a different choice-of-law rule "for the future"?

4. Whether this Court should review a choice-of-law issue in light of the finding by the Court of Appeals that the District Court's order of summary judgment would have been reversed in light of material issues of disputed fact even if a different state's law were applicable?

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STATEMENT OF JURISDICTION

Petitioners' Statement of Jurisdiction includes an incorrect statement of the issue, along with a correct statement of jurisdiction. The issue in this action was not the choice-of-law rules announced by this Court in *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990); it appears that petitioners have acknowledged that the District Court below was obliged to apply the choice-of-law rules of Massachusetts, as required by *Ferens*.

The real issue was proper application of the Massachusetts choice-of-law rules in determining which statute of limitations governed respondent's claims in the action. Petitioners' suggestions that *Ferens* was wrongly decided, or should be subject to a limiting construction, were not raised at any stage below, and are therefore not properly included within the Court's jurisdiction on this petition.

STATEMENT OF THE CASE

A. Statement of Facts

This was an action by respondent, Michael J. Frankston ("Frankston"), to collect debts owed to him by the corporate petitioners (collectively "Aura") for loans and for services rendered. Aura has either pleaded or otherwise stipulated that Frankston was at all relevant times a resident of the Commonwealth of Massachusetts, that most of the loans in issue were negotiated by telephone from Aura's offices in California to Frankston's home in Massachusetts, and that Frankston performed substantial services for Aura at his home office in Massachusetts.[1]

---

1. Petitioners' assertion that "All relevant material acts occurred in California" is false. *See* Petitioners' Counterclaim for Damages, ¶ 2 (10a);

(Cont'd)

Aura was a high technology start-up company, of which Frankston was among the founding shareholders and directors, and it had been agreed that payment would not be due to Frankston until Aura had sufficient assets to make payment.[2]

B. Proceedings Below

1. In the District of Massachusetts

In March 1991, plaintiff filed this action in the United States District Court for the District of Massachusetts. Respondents moved to dismiss for improper venue or, in the alternative, to transfer the action to the Central District of California as a matter of convenience pursuant to 28 U.S.C. § 1404(a).[3] The District Court in Massachusetts denied petitioners' motion to dismiss,[4] but granted the alternative motion to transfer for convenience.

(Cont'd)

Defendants' Statement of Uncontroverted Facts and Conclusions of Law, ¶¶ 6, 7, 12 (14a). The Appendix includes only those portions of documents which were included in the Excerpts of Record submitted to the Court of Appeals.

2. Defendants' Statement of Uncontroverted Facts and Conclusions of Law, ¶ 20 (16a).

3. Petitioners' characterization of this motion as to dismiss or to "transfer to the proper venue" is misleading. *See* Motion to Dismiss for Improper Forum, or In the Alterative, Motion to Transfer to Another District (1a).

4. Petitioners' assertion that the Massachusetts Court did not pass on the venue question is false. *See* transcript of hearing (5a, 6a).

2. In the Central District of California

In February 1992, after the transfer to the Central District of California had been effected, petitioners answered and filed counterclaims which specifically relied on California law.

One of petitioners' counterclaims was dismissed on summary judgment, a ruling petitioners did not appeal. Petitioners' other counterclaims were dismissed by stipulation.

Petitioners sought and obtained summary judgment dismissing all of Frankston's claims on the ground that they were barred by California's two-year statute of limitation for breach of oral contract. The District Court held that it had discretion to choose whether or not to apply the statute of limitations of the state in which the action had been filed.

3. In the Court of Appeals

Frankston appealed the grant of summary judgment on the following grounds, which had been asserted to the District Court:

> 1. In a diversity action transferred for convenience, the transferee court is obliged to apply the law, including the choice-of-law rules, that would have been applied by the transferor court (*Ferens v. John Deere Co., supra*, 494 U.S. at 524-25); the transferor court was obliged to apply the law of the state in which it sits (*Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 21 L. Ed. 1188 (1938)); and binding precedents by both the Massachusetts Supreme Judicial Court (*Clark v. Pierce*, 215 Mass. 552, 553, 102 N.E. 1094 (1913)) and the United States Court of Appeals for the First Circuit (*Hemric v. Reed and Prince Manufacturing Co.*, 739 F.2d 1 (1st Cir. 1984)) would have required the transferor court

in this action to apply Massachusetts' six-year statute of limitations to Frankston's claims.

2. Even if California's statutes of limitation could properly be applied to Frankston's complaint, the undisputed facts showed that at least some of Frankston's claims had been timely filed even under California law, and that summary judgment for petitioners on the remaining claims was precluded by genuine disputes as to material facts.

A few weeks before the hearing in the Court of Appeals, the Supreme Judicial Court of Massachusetts announced that, "for the future," Massachusetts courts should no longer automatically apply Massachusetts' own statutes of limitation, but should engage in analysis of various factors to determine which statute of limitation to apply. *New England Telephone & Telegraph Co. v. Gourdeau Construction Co.*, 419 Mass. 658, 664, 647 N.E. 2d 42 (1995). Petitioners urged the Court of Appeals to ignore the explicitly prospective nature of this change in Massachusetts' choice-of-law rules, and to apply the new rule retroactively to this action.

The Court of Appeals rejected petitioners' argument, correctly holding that "the District Court was required to apply the law in effect at the time the action arose." *See* Petition at 5a. The Court of Appeals also noted that "summary judgment may have been inappropriate" even under California law, because there "appear to be material issues of disputed fact"; elaboration of that point was not necessary in light of the resolution of the choice-of-law question. *Id.* at n. 3. Petitioners do not challenge this finding, so issuance of certiorari in this case could not change the result.

The Court of Appeals denied petitioners' subsequent request for a rehearing, without discussion.

REASONS FOR DENYING THE WRIT

There are no special or important reasons for certiorari in this case. The decision of the United States Court of Appeals for the Ninth Circuit is fully in accord with the decisions of this Court, and does not appear to conflict with decisions of any other Court of Appeals. The only federal question presented below is a procedural matter which could not arise in the state courts. Nor is there any possible suggestion that the Court of Appeals here has departed from the accepted and usual course of judicial proceedings; indeed, it had been the District Court in this action which strayed from established law, and the Court of Appeals corrected that error.

I.

CORRECTNESS OF VENUE IN MASSACHUSETTS IS A SHAM ISSUE.

Petitioners base their entire argument on the assertion that venue was not proper in the District of Massachusetts in the first place, and that the District Court for the District of Massachusetts erred by declining to decide petitioners' motion to dismiss on that ground (Petition, p. 2). Both components of this premise are mistaken.

First, the District Court did expressly deny petitioners' motion to dismiss for improper venue. That denial was not incorporated into a formal written order, but the transcript is unambiguous (5a, 6a). Petitioners did not challenge that ruling in the Court of Appeals, so they should not be permitted to challenge it this Court.

Second, the District Court's denial of petitioners' venue motion was correct because venue was proper in Massachusetts. Petitioners' counterclaim affirmatively alleges that respondent was at all times a resident of Massachusetts (10a), and petitioners' own statement of "Uncontroverted Facts" in support of their summary judgment motion acknowledged that many of the contracts at issue in the litigation were entered into in telephone conversations between petitioners in California and respondent in Massachusetts (14a), and that a substantial portion of respondent's performance of the contracts was completed in Massachusetts (*id.*). Since venue could properly be founded on those contacts, the denial of petitioners' venue motion was correct, and petitioners' choice not to appeal it was sensible.

II.

IT IS NOT NECESSARY THAT EVERY CLAIM IN AN ACTION BE GOVERNED BY THE LAW OF THE SAME STATE.

One recurrent theme in the petition is that it seems unfair that the timeliness of the complaint, which was filed in Massachusetts by a Massachusetts resident relying on Massachusetts law, be governed by Massachusetts law, while California law was applied to the counterclaim filed in California by California residents affirmatively relying on California law. Again, petitioners did not appeal the dismissal of their counterclaim, so that issue is not properly before this Court.

Moreover, it has been established by this Court that the laws of different states could govern procedural and substantive aspects of a single claim. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 108 S. Ct. 2117, 100 L. Ed. 2d 743 (1988). A suggestion that all aspects of all claims must be governed by the laws of the same state, regardless of either traditional or modern choice-of-

law principles, would turn decades of diversity jurisprudence inside out.

Moreover, petitioners note that California's statute of limitations would be applied to bar the counterclaim under either California or Massachusetts choice-of-law rules, so there is no federal question here (*see* Petition at p. 5, n. 8).

III.

THE DISTRICT COURT WAS BOUND TO APPLY THE LAW IN EFFECT IN MASSACHUSETTS WHEN THE ACTION WAS FILED.

Four years after this action was filed, Massachusetts adopted a new choice-of-law rule, "for the future." *New England Telephone & Telegraph Co. v. Gourdeau Construction Co.*, 419 Mass. 658, 647 N.E. 2d 42 (1995). Petitioners seize upon this as the basis for arguing that the Court of Appeals erred by reversing a "correct prediction" of this change of law.

However, the District Court in this diversity action had no privilege to predict changes in state law. It was required to apply the law in effect at the time the action was filed. *E.g., In re: Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), *reh'g denied, op. modified*, 810 F.2d 1517 (1987).

Petitioners try to evade this sensible and practical rule by arguing that silence from the highest court in Massachusetts since 1913 should be construed as an indication that there simply was no law in effect in Massachusetts when this action was filed. However, the lower courts in Massachusetts have consistently applied the rule set forth by the Massachusetts Supreme Judicial Court in 1913. *See, e.g., Wilcox v. Riverside Park Enterprises*, 21

Mass. App. 419, 421, 487 N.E. 2d 860, 861 (Mass. App. 1986), *rev'd on other grounds*, 399 Mass. 533 (1987). Silence from the Supreme Judicial Court meant no more than that the law was firmly settled.

Moreover, the federal district court in Massachusetts would have been bound by the holdings of the United States Court of Appeals for the First Circuit, which had specifically disapproved a prediction that Massachusetts might change its law and instructed the Massachusetts district court to continue applying the law as it was. *Hemric v. Reed and Prince Manufacturing Co.*, 739 F.2d 1 (1st Cir. 1984).

Perhaps most significant, the "prediction" of a change of Massachusetts' law in this action was premature, because the Massachusetts Supreme Judicial Court did have occasion to confirm that the traditional rule was still the law in Massachusetts, as recently as 1994 (several months after the District Court in California made its erroneous "prediction"). *Cosme v. Whitin Machine Works, Inc.*, 417 Mass. 643, 645, 632 N.E. 2d 832, 834 (1994).

IV.

A DIFFERENT CHOICE-OF-LAW RULE WOULD STILL BRING THE SAME RESULT.

The Court of Appeals acknowledged that, even if California's statute of limitations were applied to this case, the summary judgment order would still have been reversed (Petition at 5a, n. 3). As petitioners have not challenged that finding, certiorari would merely delay, but not change, the result.

CONCLUSION

Shorn of its misrepresentations of the factual and procedural record below, the petition has nothing left of substance. It should be denied.

Respectfully submitted,

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APPENDIX A — DEFENDANTS' MOTION TO DISMISS FILED NOVEMBER 15, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed by clerk 11/15/91]

No. 91-10806C

Docketed: 91
6232HLH (CTx)

MICHAEL FRANKSTON,

Plaintiff,

v.

AURA SYSTEMS, INC.; CYPHER MASTER, INC.; INNOVATIVE INFORMATION SYSTEMS; and ZVI KURTZMAN,

Defendants.

MOTION TO DISMISS FOR IMPROPER FORUM, OR, IN THE ALTERNATIVE, MOTION TO TRANSFER TO ANOTHER DISTRICT

Pursuant to Fed. R. Civ. P. 12(b)(3), defendants Aura Systems, Inc., Cypher Master, Inc., Innovative Information Systems, and Zvi Kurtzman move this Court to dismiss Plaintiff's Complaint for improper venue. In the alternative, defendants move this Court to transfer the action to a more convenient forum pursuant to 28 U.S.C. Section 1404.

Appendix A

The grounds for this action are set forth in defendants' Memorandum of Law and the Declarations of Zvi Kurtzman and Matthew P. Todd filed herewith.

Respectfully submitted,
AURA SYSTEMS, INC., CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS, and ZVI KURTZMAN,

By their attorneys,

s/ Alan D. Rose
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s/ Matthew P. Todd
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Dated: July 12, 1991

Appendix A

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within document by hand upon all counsel of record.

s/ Barbara E. Chernoff
Barbara E. Chernoff

July 12, 1991

APPENDIX B — EXCERPTS OF TRANSCRIPT OF HEARING

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 91-10806-C

MICHAEL FRANKSTON,

Plaintiff,

v.

AURA SYSTEMS, ET AL.,

Defendants.

HEARING

BEFORE THE: THE HON. ANDREW A. CAFFREY
SENIOR JUDGE
U.S. DISTRICT COURT

APPEARANCES:

David S. Mackey, Esq.
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Exchange Place
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on behalf of the Plaintiff

Matthew P. Todd, Esq.
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Los Angeles, CA 90025
on behalf of the Defendants

Appendix B

Courtroom No. 1
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109
September 18, 1991

Barbara Sakurai
Official Court Reporter
1221 Post Office & Courthouse Building
Boston, Massachusetts 02109

Method of Reporting: Stenotype

[The next page in the record in the Court of Appeals was p. 9 of the original transcript.]

the Defendants.

Mr. Frankston lives and works in Massachusetts, and did so all the times that are relevant to this particular case. And the Defendants, as Mr. Todd has indicated, reside in California.

Now, the Defendants have filed what is really two motions: One is a Motion to Dismiss for Improper Venue, and then, in the alternative, a Motion to Transfer the Case out to California.

THE COURT: I am only interested in the Motion to Transfer. I will deny the Motion to Dismiss for Improper Venue.

MR. MACKEY: All right. That is fine, your Honor.

I can address the Motion to Transfer very briefly, in one sentence. This Court has held time and time again in the Homeowners Funding Corporation case, and in the Berrigan case

that we have discussed in our brief, there is a presumption in favor of the Plaintiff's choice of forum, and that it is the Defendant who bears the burden of showing that transfer is warranted.

I believe the statute provides the transfer is warranted where the interests of justice so require and where it would be more convenient for the parties and for the witnesses.

[The next page in the record in the Court of Appeals was page 11 of the original transcript.]

whether or not their testimony is relevant. To say the least, I would be surprised if he needed to bring seven or eight corporate officers here to testify in this matter.

The standard under 1404, again, is that the Defendant bears the burden of proof on the issue. Simply shifting the inconvenience from one party to another is not sufficient rationale, and, therefore, Mr. Frankston, the Plaintiff, respectfully requests that the Defendants' motion be denied.

THE COURT: All right. Thank you.

Well, I am going to rule that the Motion to Dismiss for Improper Venue is denied, and that the Motion for a Transfer under 1404(a) is allowed, because of the fact that Mr. Todd has listed eight witnesses he represented to the Court are material to the preparation of his defense. And, in the interests of justice and the convenience of the witnesses and parties, I am going to transfer the case to the Central District of California.

MR. TODD: Thank you, your Honor.

Appendix B

I want to make the record clear that I believe there are more witnesses. I don't want that list to be an all-inclusive list. I have a good-faith belief that there are more than those eight witnesses. Those are just the eight that I could name off the top of my head here today.

THE COURT: All right.

[The remainder of the original transcript was not included in the record in the Court of Appeals.]

APPENDIX C — COUNTERCLAIM FOR DAMAGES; DEMAND FOR JURY TRIAL FILED FEBRUARY 19, 1992

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INNOVATIVE INFORMATION SYSTEMS
and ZVI KURTZMAN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed by clerk 2/19/92]

No. CV-91-6232JMI (CTx)

MICHAEL FRANKSTON,

Plaintiff,

vs.

AURA SYSTEMS, INC., CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS, and ZVI KURTZMAN,

Defendants.

Appendix C

AURA SYSTEMS, INC., a Delaware corporation, CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS, ZVI KURTZMAN,

Counterclaimants,

vs.

MICHAEL FRANKSTON,

Counterdefendant.

COUNTERCLAIM FOR DAMAGES;
DEMAND FOR JURY TRIAL

Counterclaimants AURA SYSTEMS, INC., a Delaware corporation, (hereinafter "AURA"), CYPHER MASTER, INC., (hereinafter "CMI"), INNOVATIVE INFORMATION SYSTEMS (hereinafter "IIS") and ZVI KURTZMAN, allege as follows:

PRELIMINARY ALLEGATIONS

1. Counterclaimants: AURA is now and at all times herein relevant was, a corporation duly organized under the laws of the State of Delaware and authorized to do business and doing business in the County of Los Angeles, State of California. In 1988, AURA purchased a corporation known as CYPHER MASTER INC., (hereinafter "CMI") and has operated a company known as INNOVATIVE INFORMATION SYSTEMS (hereinafter "IIS") as a subsidiary. ZVI KURTZMAN was and is a resident of the County of Los Angeles, State of California and at all relevant times herein, was an officer and director or AURA, CMI and IIS.

Appendix C

2. Counterdefendant: Michael Frankston (hereinafter "FRANKSTON") is now and at all times herein relevant was, a resident of the State of Massachusetts. From 1986 through January, 1987, FRANKSTON served as the chief financial officer of CMI. From 1986 through February, 1987, FRANKSTON served on the board of directors of IIS. From February, 1987 through January, 1989, FRANKSTON served on the board of directors of AURA. In 1986, when FRANKSTON first became involved with the AURA, CMI and IIS, FRANKSTON was a wealthy investor who professed

[The remainder of the original document was not included in the record in the Court of Appeals.]

APPENDIX D — DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV91-6232LGB(CTx)

MICHAEL FRANKSTON,

Plaintiff,

v.

AURA SYSTEMS, INC., CYPHER MASTER, INC., INNOVATIVE INFORMATION SYSTEMS and ZVI KURTZMAN,

Defendants.

AND RELATED COUNTERCLAIMS

Appendix D

DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

[Central District
Local Rule 7.14.1]
Date: 9/13/93
Time: 9:00 am
Dept:
Hon. Lourdes Baird
Accompanying papers: Notice of Motion and Motion, Memorandum of Points and Authorities, Declaration of Frank T. Phelan, Declaration of Margaret Mullin Weems in Support of Defendants' Motion for Summary Judgment and Proposed Order.

Pursuant to the Federal Rules of Civil Procedure, Rule 56 and Local Rule 7.14.1, defendants Aura Systems, Inc. ("Aura"), Cypher Master Inc. ("CMI"), Innovative Information Systems ("IIS"), and Zvi Kurtzman ("Kurtzman") (collectively, "defendants") serve the following Statement of Unconverted Facts and Conclusions of Law in support of defendants' motion for summary judgment.

UNCONTROVERTED FACTS

1. Federal jurisdiction is based on diversity of citizenship of the parties.

[Pre-trial Conference Order at 2:17-27, Declaration of Margaret Mullin Weems ("Weems Decl.") at Exhibit "G".]

Appendix D

2. Defendant Aura Systems, Inc. ("Aura") has its principal place of business in El Segundo, California.

[Complaint and Jury Demand ("Complaint") at 2, ¶ 5, Weems Decl. at Exhibit "A".]

3. Defendant Cypher Master, Inc. ("CMI") has its principal place of business in El Segundo, California.

[Complaint at 2, ¶ 6, Weems Decl. at Exhibit "A".]

4. Defendant Innovative Information Systems, Inc. ("IIS") is a California corporation which has its principal place of business in El Segundo, California.

[Complaint at 2, ¶ 7, Weems Decl. at Exhibit "A".]

5. Defendant Zvi Kurtzman ("Kurtzman") is a citizen of California who resides in Los Angeles, California. Kurtzman is the president and principal executive officer of Aura and is a member of its board of directors. From 1984 to 1988, Kurtzman served as president of CMI and was a member of its board of directors. From 1984 to 1987, Kurtzman was also president of IIS and a member of its board of directors. At all times relevant to this Complaint, Kurtzman directed and controlled the operations of Aura, CMI and IIS.

[Complaint at 3, ¶ 8, Weems Decl. at Exhibit "A".]

6. Plaintiff Michael Frankston ("Frankston") is a resident of the Commonwealth of Massachusetts, but through the beginning of 1988 he was also a resident of the State of California.

Appendix D

Frankston had his own office at the defendant companies' facilities in California. From his home office in Massachusetts, Frankston also performed investing, research and planning for the defendant, California companies.

[Complaint at 2, ¶ 4, Weems Decl. at Exhibit "A"; Answer to Counterclaim for Damages ("Counterclaim Answer") at 2:10-13, Weems Decl. at Exhibit "F"; Deposition of Michael Frankston ("Frankston Depo.") at 7:7-8:4, 12:24-13:6 (15:3-12), 753:18-22, 754:18-22, Weems Decl. at Exhibit "E".]

7. From May 1986 through October 1988, Frankston performed a variety of consulting tasks for Aura, CMI and IIS related to the development and marketing of Aura's, CMI's and IIS's new products. From August, 1986 until January 1987, Frankston was the chief financial officer of CMI. From February 1987 until January 1989, Frankston served on the board of directors of Aura. From October 1986 until February 1987, Frankston served on the board of directors of IIS.

[Complaint at 4, ¶ 9, Weems Decl. at Exhibit "A"; Affidavit of Michael Frankston ("Frankston Affidavit") at 2, ¶ 3, Weems Decl. at Exhibit"H".]

[The next page in the record in the Court of Appeals was page 5 of the original document.]

12. Beginning in August 1986, through December 1986, Kurtzman made telephone requests for loans of money to Frankston. The telephone requests were made by telephone from the company's offices in California. Frankston responded to these requests by delivering funds to the defendant companies' offices in California.

Appendix D

[Frankston Affidavit at 6, ¶ 5, Weems Decl. at Exhibit"H".]

13. All the contracts at issue were oral.

[Plaintiff's Contentions of Fact and Law ("Plaintiff's Contentions") at 3:3, Weems Decl. at Exhibit "J".]

14. In May 1986 Kurtzman, CMI, IIS and Frankston agreed that Frankston would render consulting services to CMI and IIS and in return CMI and IIS would pay to Frankston $10,000 per month.

[Complaint at 4-5, ¶ 17, Weems Decl. at Exhibit "A".]

15. On or about August 30, 1986, at the specific request of Kurtzman, Frankston gave $49,000 to CMI to purchase stock in a company called Instant Software Generation, Inc. ("ISG").

[Complaint at 3-4, ¶ 11, Weems Decl. at Exhibit "A"; Declaration of Michael Frankston in Support of Motion for Partial Summary Judgment at 1:26-2:2, Weems Decl. at Exhibit "K".]

16. In October 1986, Frankston was granted options on 49,500 shares of stock of AmCan, the parent company of CMI, which were exercisable at $5.25 Canadian and were due to expire on October 27, 1988. Frankston did not exercise his options on these shares.

[Complaint at 13, ¶ 60 and at 14 ¶ 62, Weems Decl. at Exhibit "A"; Plaintiff's Contentions at 8:7-18, Weems Decl. at Exhibit "J".]

Appendix D

17. On or about November 24, 1986, Frankston loaned $29,600 to one of the defendants.

[Complaint and Jury Demand at 3-4, ¶ 11, Weems Decl. at Exhibit "A".]

18. In late 1986, Frankston loaned Kurtzman and CMI 11,250 shares of AmCan stock. Kurtmzan and CMI promised to return the shares to Frankston upon demand or, if the shares were not available at the time of the demand, as soon thereafter as the shares were available.

[Complaint at 9-10, ¶ 39, Weems Decl. at Exhibit "A".]

19. On or about December 30, 1986, at the specific request of Kurtzman, Frankston lent $35,000 to CMI.

[Complaint at 3-4, ¶ 11, Weems Decl. at Exhibit "A"; Declaration of Michael J. Frankston in Support of Motion for Partial Summary Judgment at 2:13-15, Weems Decl. at Exhibit "M".]

20. Kurtzman, CMI and IIS agreed to repay the loans to Frankston upon demand, or if the funds were not available at the time of demand, as soon thereafter as CMI, IIS or Kurtzman had the funds available.

[Complaint at 4, ¶ 12, Weems Decl. at Exhibit "A".]

21. In the spring of 1987, $6,318.85 was lost on a stock investment. The funds were deducted from Frankston's personal trading account. Kurtzman agreed that Aura, CMI or IIS would

repay the $6,318.85 on demand, or, if the funds were not available at the time of demand, as soon thereafter as the funds were available.

[Complaint at 9, ¶¶ 35-36, Weems Decl. at Exhibit "A".]

22. In September 1988 Frankston travelled to Los Angeles to meet Kurtzman. Kurtzman reaffirmed the agreement to pay Frankston his salary. Kurtzman agreed that Frankston would thereafter perform services on a "half-time" basis for a minimum of $5,000/month for services rendered after September, 1988, with payment to be made at the end of every month.

[Complaint at 6, ¶ 22, Weems Decl. at Exhibit "A".]

23. All of the agreements alleged to have been made in the Complaint and in the Counterclaim were oral.

[Pre Trial Conference Order at 5:23-24, Weems Decl. at Exhibit "G".]

24. On September 23, 1988 (the "September Meeting"), Frankston attended a meeting at the offices of Aura, in Los Angeles County, to discuss, among other things, stock options Frankston contemplated offering or had offered to employees of the company. The options regarded his own shares in Aura.

[Frankston Depo. at 365:8-12, 366:4-20, Weems Decl. at Exhibit "E".]

25. At the September 1988 meeting, Frankston stated to Kurtzman that he estimated the defendants owed him $250,000.

Appendix D

[Frankston Depo. at 350:10-15, Weems Decl. at Exhibit "E".]

26. Frankston accepted a check in the amount of $28,990 at the end of a November 1, 1988 meeting in Los Angeles County.

[Frankston Depo. at 440:15-25, Weems Decl. at Exhibit "E".]

27. On November 2, 1988, Frankston met with Kurtzman in Los Angeles County. They orally agreed to prepare lists of payments and loans and obligations between each other and the companies.

[Frankston Depo. at 455:25-456:12, Weems Decl. at Exhibit "E".]

28. In December 1988, Frankston had a telephone conversation with Kurtzman. At that time they discussed items related to payments and loans and obligations between each other and the companies.

[Frankston Depo. at 463:21-24, Weems Decl. at Exhibit "E".]

29. The December 1988 telephone conversation did not result in any agreement between Frankston and Kurtzman.

[Frankston Depo. at 471:9-14, and Exhibit 5 (Frankston's handwritten notes), Weems Decl. at Exhibit "E".]

30. Frankston has not performed any service of any sort for

any of the defendants-counterclaimants since resigning from the Board of Directors of Aura in January, 1989.

[Plaintiff's Statement of Unconverted Facts and Conclusions of Law at 2:21-23, Weems Decl. at Exhibit "O"; Declaration of Michael J. Frankston at ¶ 9, Weems Decl. at Exhibit "M".]

31. Defendants could afford to repay the loans to Frankston at least as of February 28, 1989.

[Declaration of Frank T. Phalen at ¶ 2, Weems Decl. at Exhibit "L".]

32. Frankston's next communication with Kurtzman was to mail, by certified mail, return receipt requested, a letter dated March 1, 1989.

[Frankston Depo. at 473:2-5, Weems Decl. at Exhibit "E"; Weems Decl. at Exhibit "C" (March 1, 1989 letter); Complaint at Exhibit "A".]

33. Frankston sent the letter dated March 1, 1989 to Kurtzman on or around the beginning of March, 1989.

[Frankston Depo. at 473:2-5, Weems Decl. at Exhibit "E".]

34. The March 1, 1989 letter was delivered on March 14, 1993.

[Weems Decl at Exhibit "C" at 4. (March 1, 1989 letter, return receipt)]

Appendix D

35. Neither Kurtzman nor any other representative of any of the defendant companies responded to Frankston's March 1, 1989 letter.

[Complaint at 12, ¶ 52, Weems Decl. at Exhibit "A".]

36. The Complaint in this action was filed March 13, 1991.

[Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law at 2:24-25, Weems Decl. at Exhibit "O"; Declaration of Joshua Tropper at ¶ 2, Weems Decl. at Exhibit "N".]

37. Between November 1, 1988 and the present, Aura did not pay any amount to Frankston.

[Pre Trial Conference Order at 5:12-13, Weems Decl at Exhibit "G".

[The remainder of the original document was not included in the record in the Court of Appeals.]